Supreme Court, U.S.
FILED
JUL 29 1993
OFFICE OF THE CLERK

No. 92-1903

In The

Supreme Court of the United States

October Term, 1992

RAMSEY S. AGAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

SUSAN V. BOLEYN
Senior Assistant
Attorney General
Counsel of Record
for Respondent

MICHAEL J. BOWERS
Attorney General

PAIGE M. REESE
Staff Attorney

Please serve:

Paige M. Reese
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-5734

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

I.

Whether this Court should decline to grant certiorari to review Petitioner's disagreement with a decision by the Supreme Court of Georgia affirming a fact-based determination by the lower courts which properly applied authority of this Court on selective prosecution claims to Petitioner's case?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW PETITIONER'S DISAGREEMENT WITH A DECISION BY THE SUPREME COURT OF GEORGIA AFFIRMING A FACT-BASED DETERMINATION BY THE LOWER COURTS WHICH PROPERLY APPLIED AUTHORITY OF THIS COURT ON SELECTIVE PROSECUTION CLAIMS 4

CONCLUSION 9

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

CASES

Berenyi v. Immigration Director, 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967) 7

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 7

Fry Roofing Co. v. Wood, 344 U.S. 157, 73 S.Ct. 820, 57 L.Ed. 168 (1952) 7

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 (1949) 7

Grayson v. Harris, 267 U.S. 352, 45 S.Ct. 317, 69 L.Ed. 652 (1925) 7

NCAA v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) 7

Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) 2, 5

Portland Ry. Co. v. Railroad Comm., 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248 (1913) 7

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) 7

Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) 8

Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1943) 5

State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), *cert. den.*, 110 S.Ct. 1526 (1990) 1

TABLE OF AUTHORITIES – Continued

Page

Texas v. Mead, 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed.2d 714 (1984) 5

U.S. v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) 7

U.S. v. Johnston, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925) 5

Wayte v. U.S., 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) 5, 8

Yick Wo v. Hopkins, 18 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 1, 5

STATUTES AND REGULATIONS

O.C.G.A. § 16-10-2 1

No. 92-1903

In The

Supreme Court of the United States

October Term, 1992

RAMSEY S. AGAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE
STATEMENT OF THE CASE

On June 19, 1987, Petitioner, Ramsey S. Agan, was indicted on three counts of bribery in violation of O.C.G.A. § 16-10-2. The facts surrounding the bribery counts are reported in *State v. Agan*, 259 Ga. 541, 384 S.E.2d 863 (1989), *cert. den.*, 110 S.Ct. 1526 (1990), the first opinion of the Georgia Supreme Court in this case, and concern the bribery of two DeKalb County Commissioners. On September 17, 1987, Petitioner filed a motion to dismiss for selective prosecution and for an evidentiary hearing, relying on this Court's decisions in *Yick Wo v.*

Hopkins, 18 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The trial court ruled that Petitioner was not entitled to a hearing on his motion to dismiss for selective prosecution because his proffered evidence that others had made "campaign contributions" to county commissioners while zoning matters concerning their properties were under consideration by the commission failed to establish a prima facie case of selective prosecution.

Petitioner proceeded to trial and was convicted by a jury of all three counts of bribery. Petitioner appealed his conviction to the Court of Appeals of Georgia, which reversed based on certain aspects of the jury charge and ordered a new trial. The Court of Appeals also noted that the trial court had applied the wrong standard in determining whether to grant Petitioner a hearing on his selective prosecution claim.

The State petitioned the Supreme Court of Georgia for a writ of certiorari to the Court of Appeals of Georgia, which was granted. In its decision, the Supreme Court of Georgia reversed the Georgia Court of Appeals in part, finding that no reversible error occurred at trial, and further rejected certain constitutional arguments raised by Petitioner. The Supreme Court of Georgia affirmed the decision of the Georgia Court of Appeals on the issue of selective prosecution and remanded the case to the trial court with direction that an evidentiary hearing be granted to Petitioner on his proffer regarding the issue of selective prosecution.

Petitioner then petitioned this Court for a writ of certiorari to the Supreme Court of Georgia, which was denied.

Following this Court's denial of Petitioner's petition for writ of certiorari, the trial court held a full evidentiary hearing on Petitioner's claim of selective prosecution. After hearing the evidence presented, the trial court issued an order denying Petitioner's motion to dismiss for selective prosecution based upon its finding that Petitioner had failed to establish the existence of selective prosecution in this case.

Petitioner appealed to the Court of Appeals of Georgia, which reviewed all of the evidence presented at the hearing. After analyzing the evidence under this Court's selective prosecution decisions, the Court of Appeals of Georgia concluded that Petitioner had failed to show that there were others who were similarly situated to Petitioner and who were not being prosecuted and further held that Petitioner had failed to show that his own prosecution was the result of deliberate discrimination against Petitioner based on an unjustifiable standard under this Court's decisions. The Court of Appeals of Georgia therefore affirmed the trial court's ruling finding that Petitioner had failed to establish selective prosecution in this case.

Petitioner petitioned the Supreme Court of Georgia for a writ of certiorari to the Georgia Court of Appeals, which was granted on an evidentiary issue. Upon examination, the Supreme Court of Georgia found that, contrary to Petitioner's contention that the trial judge had refused to permit Petitioner to introduce post-indictment

evidence of the district attorney's failure to investigate corrupt campaign practices, the record reflected that the judge did not so limit the district attorney's testimony, that Petitioner was permitted to question the district attorney on matters relating to any time period, and that Petitioner was also permitted to introduce evidence of post-indictment campaign contribution made by others. The Supreme Court of Georgia held that the trial court's evidentiary rulings on admissibility of evidence did not amount to an abuse of discretion and affirmed the decision of the Georgia Court of Appeals below.

It is this decision by the Supreme Court of Georgia which Petitioner now seeks to review.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW PETITIONER'S DISAGREEMENT WITH A DECISION BY THE SUPREME COURT OF GEORGIA AFFIRMING A FACT-BASED DETERMINATION BY THE LOWER COURTS WHICH PROPERLY APPLIED AUTHORITY OF THIS COURT ON SELECTIVE PROSECUTION CLAIMS.

Petitioner seeks review by this Court of the decision of the Supreme Court of Georgia affirming the judgment of the Court of Appeals of Georgia which found, based upon a review of the evidence presented to the trial court, that Petitioner had failed to prove the existence of selective prosecution in his case and that the trial court's denial of Petitioner's motion to dismiss on that basis was proper. The Court of Appeals of Georgia affirmed the

trial court's decision by reviewing the evidence presented at the hearing under this Court's selective prosecution jurisprudence set forth in *Yick Wo, supra,* 18 U.S. 356, *Oyler,* 368 U.S. 448, and *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1943), and adopted by the Georgia courts.

This Court does "not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925 (1925); *see also Texas v. Mead,* 465 U.S. 1041, 1043, 104 S.Ct. 1318, 1320, 79 L.Ed.2d 714 (1984) (Stevens, J. dissenting from the denial of a writ of certiorari). The Georgia courts have appropriately applied the prevailing law set forth by this Court to the facts of this case. This Court has consistently held that in order to prevail on a claim of selective prosecution, the person asserting the claim must meet the heavy burden of establishing (1) that others similarly situated have not been prosecuted, *Yick Wo,* 6 S.Ct. at 1073; *Snowden,* 321 U.S. at 8, and (2) that the government's selective prosecution was unconstitutional because actuated by impermissible motives such as race, religion, or other arbitrary classification. *Oyler,* 368 U.S. at 456; *Wayte v. U.S.,* 470 U.S. 598, 105 S.Ct. 1524, 1531 84 L.Ed.2d 547 (1985).

Applying this Court's selective prosecution decisions to the evidence presented at the hearing on that issue, the Georgia Court of Appeals concluded that Petitioner "has not shown that others in a similar situation were not prosecuted." In support of this finding, the Georgia Court of Appeals listed eight factors which distinguished Petitioner's situation from the situations of other persons

offered by Petitioner as "similarly situated". The culmination of these differences between Petitioner's situation and the proffered situations resulted in Petitioner's failure to prove "similarly situated persons".

The Court of Appeals also concluded from an application of this Court's selective prosecution decisions to the facts presented at the hearing that Petitioner had likewise failed to prove any intentional discriminatory motive in the decision to prosecute Petitioner. The Court of Appeals found that the district attorney had investigated and questioned each commissioner, in the wake of Petitioner's case, about his or her campaign contributions and that he had found no instance in which the strength and amount of evidence approached the strength and amount of evidence present in Petitioner's case. The Court of Appeals concluded that nothing in the facts presented at the hearing offered any proof that the district attorney prosecuted Petitioner "for any reason other than good faith law enforcement."

The Court of Appeals stated its agreement with the trial court's findings that Petitioner had not met his burden of showing that the district attorney failed to prosecute any case with similar information. The Court of Appeals further agreed that Petitioner had not met his burden of showing that the district attorney's decision to prosecute Petitioner was unconstitutional because it was deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. Based upon its review of the facts presented at the hearing on the issue of selective prosecution under this Court's decisions on the issue, adopted by the Georgia courts for use in determining claims of selective prosecution, the Court

of Appeals concurred with the trial court's findings of fact on the issue of selective prosecution.

This Court has consistently held that it will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson v. Harris*, 267 U.S. 352, 358, 45 S.Ct. 317, 69 L.Ed. 652 (1925); *Portland Ry. Co. v. Railroad Comm.*, 229 U.S. 397, 412, 33 S.Ct. 820, 57 L.Ed. 1248 (1913); *Fry Roofing Co. v Wood*, 344 U.S. 157, 160, 73 S.Ct. 820, 57 L.Ed. 168 (1952). Petitioner contends that the Georgia courts' interpretation of the facts was erroneous and that the facts presented at the hearing on the issue of selective prosecution establish, contrary to the findings of the trial court and the Georgia Court of Appeals, that Petitioner was selectively prosecuted. Petitioner's assertion is in essence a request that this Court grant certiorari solely to review the same facts reviewed by the Georgia Courts and to reach a different conclusion.

This Court has often held that

> [A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949) (and cases cited therein). *See also Berenyi v. Immigration Director*, 385 U.S. 630, 635, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967); *Branti v. Finkel*, 445 U.S. 507, 512 n.6, 100 S.Ct. 1287, 1291 n.6, 63 L.Ed.2d 574 (1980); *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3278-79, 73 L.Ed.2d 1012 (1982); *U.S. v. Doe*, 465 U.S. 605, 613-14, 104 S.Ct. 1237, 1242-43, 79 L.Ed.2d 552 (1984); *NCAA v.*

Board of Regents, 468 U.S. 85, ___, n.15, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Petitioner has not shown such "obvious and exceptional" error in the present case.

Petitioner does not cite any state or federal cases which illustrate a conflict in the application of the test for determining selective prosecution by the lower courts. Thus, there is no basis for this Court to reexamine the application of settled law which has been consistently employed by this Court and the lower courts to evaluate selective prosecution claims. Petitioner requests that this Court attempt to oversee the factual application of the test for determining the existence of selective prosecution. However, the determination of whether a party has met the burden of proving the existence of selective prosecution is based on a specific factual situation, one which this Court has recognized "is particularly ill-suited to judicial review." *Wayte v. U.S.*, 470 U.S. at 607.

The decision to grant certiorari by this Court "depends on numerous factors other than the perceived correctness of the judgment" of the court below. *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Since the decision below was an appropriate factual determination based on established and unbroken precedent of this Court and since there is no actual conflict of law among the various courts with regard to selective prosecution analysis, this petition presents nothing for review by this Court.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, this Court should decline to grant a writ of certiorari to the Supreme Court of Georgia as it is clear that the questions presented to this Court were properly resolved under the applicable precedent from this Court.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant Attorney General
Counsel of Record

PAIGE M. REESE 598190
Staff Attorney*

Please serve:

PAIGE M. REESE
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 656-5734

*Not a member of the Bar of the United States Supreme Court.